

NSUE stance on amendment of the 2001 Mental Health Act in relation to the administration of Electro-convulsive therapy.

The practice and prescribing of ECT is a fairly controversial subject. A wide range of opinions exist within the organisation, from those who have found the administration of ECT to be of real benefit, to those who would like to see the practice banned altogether.

It was decided that by following an approach based on some relevant European Court of Human Rights judgements, an absolutely clear and legally correct policy could be developed. We submitted this to Minister John Maloney, who had asked us to do so. He was so impressed by our submission that he asked NSUE to present this to the joint oireachtas committee on mental health. The presentation is very simple and direct, consisting of only four powerpoint slides with a short explanation on each.

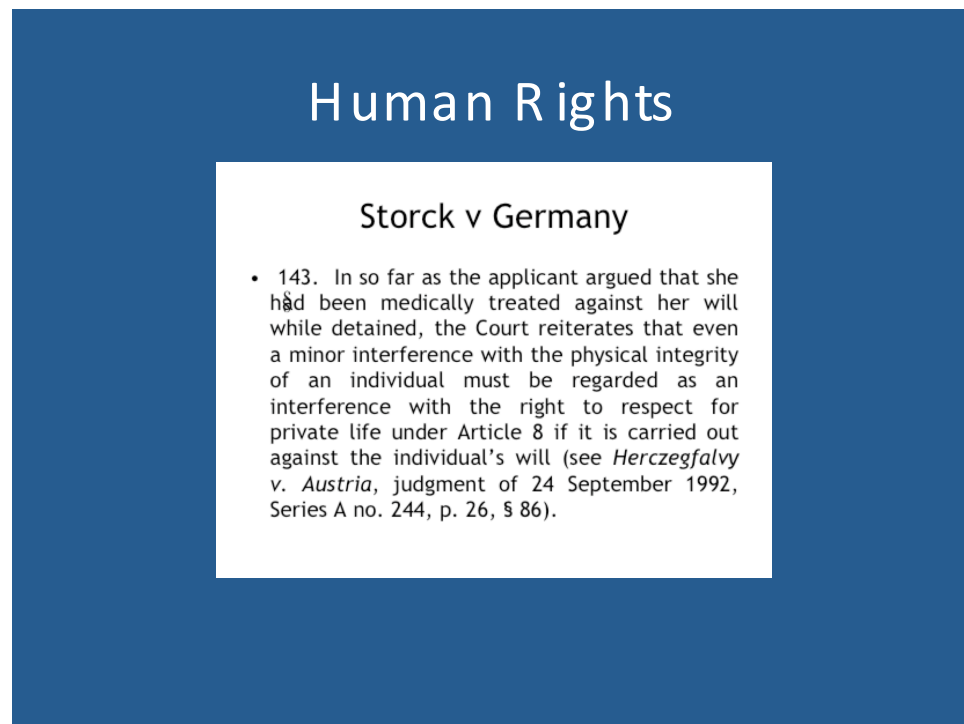
Slide 1: Herczegfalvy



The ECtHR in *Herczegfalvy* also held that the administration of treatment which was “medically” or “therapeutically” necessary did not contravene Article 3. Therefore, so long as the treatment provided to the unwilling patient is medically necessary, it is unlikely to contravene Article 3. Under *Herczegfalvy*, however, the important factor before this will arise is that the medical necessity must be “convincingly shown” to exist.

These two pieces taken together, the requirement for “special vigilance” and for necessity to be “convincingly shown” constitute a strong argument that the second opinion of a consultant psychiatrist as set down in the 2001 Act, is not a sufficient enough safeguard.

Slide 2: Storck.



Human Rights

Storck v Germany

- 143. In so far as the applicant argued that she had been medically treated against her will while detained, the Court reiterates that even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8 if it is carried out against the individual's will (see *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, p. 26, § 86).

This case further strengthens the argument which was beginning to develop in *Herczegfalvey*- and effectively means that ECT cannot be given without the consent of capable individuals. This means that the phrase “or unwilling” will have to be removed from section 59b of the 2001 Act if Ireland is to comply with its human rights obligations.

This will leave the complex situation facing those who are, in the terminology of the Act “unable” to consent. A better way of explaining this group might be to describe them as people who lack capacity.

Slide 3 Bournemouth.

Bournemouth: the case

The Bournemouth case started in July 1997 when a 49-year-old severely autistic man, known as HL, who could not speak, was admitted to Bournemouth psychiatric hospital, Surrey, after becoming distressed at a day centre.

When the day centre staff were unable to contact HL's carers (Mr and Mrs E) and could not contain the situation, a GP tried to calm him down with medication. When this didn't work the GP referred him to the local hospital where he was seen by a psychiatrist. The psychiatrist couldn't tell whether HL had a psychiatric condition or behavioural problem, so decided to admit him for observation. When he was discharged just over four months later, his carers claimed HL looked like “someone out of Belsen”.

Human Rights

New Safeguards For The Most Vulnerable People - UK Government Publishes Proposals To Close The Bournemouth Gap

The proposals mentioned here are in response to the 2004 European Court of Human Rights judgment involving an autistic man who was kept at Bournemouth Hospital by doctors against the wishes of his carers. The court found that he had been deprived of his liberty unlawfully. This exposed a serious gap in the legislation: people who lacked capacity had only the common law to protect them, and the court of human rights felt that common law was a very poor and insufficient protection. The best way to strengthen the protections for this extremely vulnerable group is to have strong capacity legislation, so that they can neither be admitted to hospital nor treated against their probable wishes.

Legal Rights

SHTUKATUROV v. RUSSIA

Representation should be
provided for those who lack
capacity

This further strengthens the capacity legislation argument that was the effective outcome of the Bournewood case. In Shtukaturvov, the European Court of Human rights said that those who did not have capacity must have proper independent representation. It is interesting that they did not specifically mention solicitors or lawyers, leaving the possibility of a role in any new capacity laws for advocacy, including peer advocacy.

Summary:

The NSUE position is this: The phrase “or unwilling” should be removed altogether, and strong capacity legislation introduced as a matter of urgency in order to protect those who are unable to make decisions for themselves. This conclusion is inescapable if the European Court of Human rights decisions are to be upheld, which Ireland is bound to do.

Footnote: It is interesting that after the NSUE position became known, both the Mental Health Commission and Amnesty Ireland made their positions public. Both of these followed closely the NSUE stance. Indeed, the Mental Health Commission asked NSUE to bring their position to the Oireachtas during the NSUE presentation. Isn't it good to have an organisation that is not afraid to lead the way.